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10 Attorneys for Defendants:

11 MISSION SAN JOSE AIRPORT, LLC and MISSION YOGURT, INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 AREAS USA SJC, LLC, a California limited
16 liability company,

17 Plaintiff,

18 v.

19 MISSION SAN JOSE AIRPORT, LLC, a
20 Colorado limited liability company, and
21 MISSION YOGURT, INC., a Colorado
22 corporation

23 Defendants.

CASE NO. CV11-04487 HRL

**ANSWER OF DEFENDANTS MISSION
SAN JOSE AIRPORT, LLC AND MISSION
YOGURT, INC. TO PLAINTIFF AREAS
USA SJC, LLC'S COMPLAINT AND
COUNTERCLAIMS THERETO**

1 Defendants Mission San Jose Airport, LLC (“Mission San Jose”) and Mission
2 Yogurt, Inc. (“Mission Yogurt”) (collectively “Defendants”) answer the Complaint (“Complaint”) of
3 Plaintiff AREAS USA SJC, LLC (“AREAS” or “Plaintiff”), and paragraph therein by number, as
4 follows:

5 **INTRODUCTION**

6 1. Defendants deny the allegations of Paragraph 1 of the Complaint.

7 **JURISDICTION AND VENUE**

8 2. Answering paragraph 2 of the Complaint, Defendants lack sufficient
9 knowledge or information to form a belief as to the truth of all the necessary allegations therein that
10 grant this Court diversity jurisdiction pursuant to 28 U.S.C. § 1332, and on that basis deny them.
11 Defendants admit that Mission San Jose and Mission Yogurt are, respectively, a Colorado limited
12 liability company and Colorado corporation with their principal place of business in Westminster,
13 Colorado. Defendants further admit that the amount in controversy exceeds \$75,000, but otherwise
14 deny the allegations of paragraph 2.

15 3. Answering paragraph 3 of the Complaint, Defendants admit that by their
16 terms the contracts in issue are to be performed in San Jose, California, but deny that Defendants
17 have consented for the reasons asserted in Defendants’ affirmative defenses asserted herein.

18 4. Admit.

19 **THE PARTIES**

20 5. Answering paragraph 5 of the Complaint, Defendants lack sufficient
21 knowledge or information to form a belief as to the truth of the allegations therein, and on that basis
22 deny them.

23 6. Answering paragraph 6 of the Complaint, Mission San Jose admits that it is a
24 limited liability company formed under the state of Colorado with its principal place of business in
25 Westminster, Colorado. Mission San Jose also admits that Mission Yogurt is its sole member.

26 7. Answering paragraph 7 of the Complaint, Mission Yogurt admits that it is a
27 corporation formed under the laws of the State of Colorado, with its principal place of business in
28 Westminster, Colorado.

FACTUAL BACKGROUND

8. Answering paragraph 8 of the Complaint, Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations therein, and on that basis deny them.

9. Defendants answer paragraph 9 of the Complaint by asserting that the subject documents speak for themselves and deny the allegations on that basis and further answer that the Concession Subcontract is unenforceable for the reasons asserted in Defendants' affirmative defenses as asserted herein. As for the rest of paragraph 9, Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations therein, and on that basis deny them.

10. Defendants generally admit the allegations of paragraph 10 of the Complaint, but deny that any legal consequences flow from such facts and further answer that terms such as "locked down" are so ambiguous as to be incapable of response, and deny them on that basis.

11. Defendants admit that they have performed under the Terminal B subconcession agreement but otherwise deny the allegations of paragraph 11.

12. Defendants admit that the described documents are attached to the Complaint, respond that the documents speak for themselves and otherwise deny the allegations of paragraph 12.

13. Defendants respond to the allegations of paragraph 13 by asserting that the documents speak for themselves, deny that they are bound by the Concession Subcontract for the reasons asserted in Defendants' Affirmative Defenses and otherwise deny the allegations of paragraph 13 on that basis.

14. Defendants deny that the issue was simply one of costs being higher than anticipated, deny that they asserted they would not comply with contractual obligations, respond that the referenced document speaks for itself, deny that the quoted language addresses the issue in controversy, deny that the language is binding on Defendants, and deny in particular that the quoted language releases Plaintiff from its acts of fraud in the inducement of the contract.

1 15. Defendants admit that the Terminal A premises have not been fully built out
2 and that payments have not been made with respect to those premises, but otherwise deny the
3 allegations of paragraph 15 of the Complaint.

4 16. Defendants admit that Plaintiff has demanded performance, but deny that such
5 performance is due and otherwise deny the allegations.

6 17. Deny.

7 **FIRST CAUSE OF ACTION – BREACH OF CONCESSION SUBCONTRACT**

8 18. Answering paragraph 18 of the Complaint, Defendants incorporate paragraphs
9 1-17 of this Answer as if fully set forth herein.

10 19. Deny.

11 20. Deny.

12 21. Deny.

13 22. Deny.

14 **SECOND CAUSE OF ACTION – BREACH OF GUARANTY CONTRACT**

15 23. Answering paragraph 23 of the Complaint, Defendants incorporate paragraphs
16 1-17 of this Answer as if fully set forth herein.

17 24. Deny.

18 25. Deny.

19 26. Deny..

20 27. Deny.

21 **PRAYER FOR RELIEF**

22 Defendants deny that plaintiff is entitled to any relief.
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DEFENDANTS' AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The Complaint, and each and every purported cause of action therein, fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Fraud in the Inducement)

The Complaint, and each and every purported cause of action therein, is barred by the doctrine of fraud in the inducement of contract formation.

THIRD AFFIRMATIVE DEFENSE

(Illusory Contract)

The agreements at issue are unenforceable for the reason that they purport to bind Defendants to perform whether or not Plaintiff performs under those agreements, therefore rendering Plaintiff's obligations illusory.

FOURTH AFFIRMATIVE DEFENSE

(Unconscionability)

The Complaint, and each and every purported cause of action therein, is barred because the contracts were unconscionable at the time formed and are therefore unenforceable.

FIFTH AFFIRMATIVE DEFENSE

(Excuse of Performance)

The Complaint, and each and every purported cause of action therein, is barred by reason of failure of consideration, waiver, breach of condition precedent, breach by AREAS, impossibility of performance, prevention by AREAS, and/or frustration of purpose.

SIXTH AFFIRMATIVE DEFENSE

(Accord and Satisfaction)

The Complaint, and each and every purported cause of action therein, is barred by the doctrine of accord and satisfaction.

SEVENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

The Complaint, and each and every purported cause of action therein, is barred by the applicable statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

(Laches)

The Complaint, and each cause of action therein, is barred by the doctrine of laches.

NINTH AFFIRMATIVE DEFENSE

(Estoppel)

The Complaint, and each cause of action therein, is barred by the doctrine of estoppel.

TENTH AFFIRMATIVE DEFENSE

(Waiver)

The Complaint, and each cause of action therein, is barred by the doctrine of waiver.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

Plaintiff failed to mitigate its damages, if any, and as a result Plaintiff is not entitled to recover the amount of damages alleged or any other damages.

THIRTEENTH AFFIRMATIVE DEFENSE

(Lack of Consideration)

The Complaint, and each and every purported cause of action therein, is barred because plaintiff failed to provide consideration for the contracts at issue.

FOURTEENTH AFFIRMATIVE DEFENSE

(Reservation of Rights)

San Jose Mission and Mission Yogurt have insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, affirmative defenses available. Defendants therefore reserve the right to assert additional affirmative defenses in the event discovery indicates that they may be appropriate.

PRAYER FOR RELIEF

WHEREFORE, having fully answered, defendants Mission San Jose Airport, LLC and Mission Yogurt, Inc., pray for judgment as follows:

1. That Plaintiff AREAS USA SJC, LLC, take nothing by reason of the First or Second Causes of Action in the Complaint, and that judgment be rendered in favor of Defendants;
2. That Defendants be awarded their costs of suit incurred in defense of this action;
3. That Defendants be awarded their reasonable attorneys' fees, and
4. For such other relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Mission San Jose Airport, LLC and Mission Yogurt, Inc. demand a trial by jury on all issues so triable.

1 **COUNTERCLAIMS OF DEFENDANTS MISSION SAN JOSE AND MISSION YOGURT**

2 Counter-claimants Mission San Jose Airport, LLC (“Mission San Jose”) and Mission
3 Yogurt, Inc. (“Mission Yogurt”) (collectively “Claimants”) hereby aver as follows:

4 **INTRODUCTION**

5 1. Although AREAS seeks to characterize this case as a simple breach of
6 contract due to Claimants’ miscalculation, that assertion grossly mischaracterizes the events at
7 issue. The facts at trial will show that AREAS intentionally and fraudulently induced Claimants into
8 entering into the subject agreements. The facts will further show that AREAS withheld, under a
9 duty to disclose, and affirmatively misrepresented material facts at the time of formation of the
10 agreements in order to induce Claimants to enter into the agreements. Indeed, AREAS insisted that
11 Claimants enter into a one-sided agreement, with numerous purported disclaimers designed to try to
12 immunize AREAS from claims of fraud, knowing all the while that the airport authority would
13 require certain costly changes and modifications to the area surrounding the space that would ensure
14 that the agreements would be unprofitable. Claimants agree that this is a simple case; however, they
15 maintain that this is a simple case of fraudulently inducing the formation of a contract. Not only is
16 AREAS not entitled to damages, but all of Claimants’ expenditures and fees in reliance on AREAS’s
17 misrepresentations should be restored to Claimants.

18 **JURISDICTION AND VENUE**

19 2. Claimants incorporate paragraphs 2-4 of the Complaint, subject to any
20 modifications or denials asserted in paragraphs 2-4 of this Answer.

21 **THE PARTIES**

22 3. Claimants incorporate paragraphs 5-7 of the Complaint, subject to any
23 modifications or denials asserted in paragraphs 5-7 of this Answer.

24 **FACTUAL BACKGROUND**

25 4. Claimants incorporate paragraphs 8-17 of the Complaint, subject to any
26 modifications or denials asserted in paragraphs 8-17 of this Answer.

27 5. Claimants relied on misrepresentations made by AREAS concerning the
28 project, including *without limitation*, the requirements imposed by the airport with respect to the area

1 surrounding the premises in Terminal A that make the agreements impossible to perform, including
 2 requirements to provide for reinforcement and other protections due to the location of the premises
 3 above the security equipment operated by the airport. AREAS knew that additional costly
 4 reinforcements and modifications would be required by the airport with respect to the area
 5 surrounding the premises but misrepresented the build-out requirements and failed to disclose the
 6 extra reinforcement and modification requirements under a duty to disclose them. AREAS further
 7 intended that Claimants would rely on such misrepresentations and omissions and Claimants did so
 8 rely to their detriment.

9 6. All told, Claimants expended in excess of \$100,000 in development costs in
 10 reliance on the misrepresentations and omissions of AREAS.

11 **FIRST CAUSE OF ACTION**

12 **(Rescission Based on Fraud in the Inducement and Failure of Consideration)**

13 7. Claimants incorporate by reference paragraphs 1-6 of this section.

14 8. AREAS misrepresented and/or concealed its knowledge about the additional
 15 construction requirements imposed by San Jose Airport on the retail space in Terminal A, and failed
 16 to disclose facts necessary to render prior misrepresentations truthful.

17 9. These misrepresentations and omissions by AREAS, specifically concerning
 18 the build-out requirements, security precautions and modifications and reinforcements, were material
 19 to Claimants' decision to enter into the agreement, and did, in fact, obfuscate Claimants' analysis on
 20 the profitability of the project and induced them to enter into an agreement under false pretenses.

21 10. AREAS knew that disclosing this information would have a material impact
 22 on Claimants' decision to enter into the contract and yet misrepresented the requirements and/or
 23 failed to provide facts necessary to render such representations truthful.

24 11. AREAS misrepresented and failed to disclose said information because it
 25 intended to induce Claimants to alter their position by entering into the agreement. Claimants'
 26 reliance on AREAS's misrepresentation was justified.

12. Reliance on AREAS's misrepresentations and omissions damaged Claimants in an amount to be proven but no less than the in excess of \$100,000 expended on development costs which Claimants would not have incurred had they been truthfully informed of the facts.

SECOND CAUSE OF ACTION

(Fraud Based on Intentional Misrepresentation and Omission)

13. Claimants incorporates by references paragraphs 1 – 12 of this section.

14. AREAS misrepresented and/or concealed its knowledge about the additional construction, security and reinforcement requirements imposed by San Jose Airport on the retail space in Terminal A, and omitted to state facts necessary to render its representations truthful.

15. These misrepresentations and omissions by AREAS were of a material fact that did, in fact, obfuscate Claimants' analysis on the profitability of the agreement, and Claimants' ability to perform under the agreement, and induced Claimants to enter into the agreements.

16. AREAS knew that disclosing this information would have an important impact on Claimants' decision and failed to do so.

17. AREAS failed to disclose said information because it intended to induce Claimants to alter their position and enter into the agreement. Claimants' reliance on AREAS's misrepresentation was justified.

18. Reliance on AREAS's misrepresentations caused damages to Claimants in an amount to be proven at trial but no less than the in excess of \$100,000 spent on development costs, causing Claimants considerable damage.

PRAYER FOR RELIEF

WHEREFORE, Mission San Jose Airport , LLC and Mission Yogurt, Inc., pray for judgment as follows:

1. For rescission of the agreements and restitution; or
2. In the alternative, for recovery of damages according to proof at trial; and
3. For Exemplary damages; and
4. For reasonable attorneys' and other fees, and costs of suit incurred herein; and

5. For such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Mission San Jose Airport, LLC and Mission Yogurt, Inc. demand a trial by jury on all issues so triable.

Dated: October 26, 2011

HOLME ROBERTS & OWEN LLP

By: s/ Daniel T. Rockey

Daniel T. Rockey

Attorneys for MISSION SAN JOSE AIRPORT,
LLC and MISSION YOGURT, INC.